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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ELLIS CHARLES WILLIAMS,

Defendant and Appellant.

G039846

(Super. Ct. No. 02CF2397)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick H. Donahue, Judge. Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Quisteen S. Shum, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant was convicted of four counts of attempted premeditated murder and one count each of shooting from a motor vehicle and shooting at an inhabited dwelling. Allegations he personally discharged a weapon, suffered four prior serious felony convictions and served a prior prison term were also found true. The trial court sentenced him to 32 years to life to prison. On appeal, he contends the court erred in admitting evidence of his alleged gang membership, giving the standard flight instruction and denying his motion for a new trial based on newly discovered evidence. We reject these contentions and affirm the judgment.

### FACTS

Willis Benton, Sr., and his wife Mary lived at 1714 Myrtle Street in Santa Ana. They knew appellant's parents well, and their sons Willis, Jr., and James grew up with appellant. Unfortunately, however, the Benton family's familiarity with appellant did not ensure tranquility between them.

On August 26, 2002, the Benton boys were visiting their parents' house, along with their children and several other relatives. Around 4:00 p.m., appellant and his friend "Voodoo" came to the house and began fighting with the Benton boys in the driveway. Punches were thrown, and blood was drawn, but Willis, Sr., and Mary eventually managed to break up the altercation. As appellant was leaving the scene, he told the Benton boys, "You guys got this one, but I'll be back."

True to his word, appellant returned to the area about 30 minutes later in a white car. He and Voodoo were in the backseat, the aptly named "Get Away" was driving, and someone named "Snow" was in the front passenger seat. Seeing the car pass in front of his parents' house, Willis, Jr., suspected trouble. He brought his children into the house and left the area with James in the hope their departure would prevent future trouble. It did not.

Soon after the Benton boys left, the white car returned for a second pass. At that time, Willis, Sr., his brother Maydell, Mary, and her four-year-old granddaughter

Tiffany were all out in front of the house. As the car approached, appellant stuck a gun out his window and began shooting toward the house. Snow did the same from his position in the front seat. They fired about half a dozen shots in the direction of the Bentons, but no one was hit.

Following the shooting, Willis, Sr., and Mary went to see appellant's grandmother, who lived nearby. They hoped to take care of the matter informally by talking it over with her, but that didn't pan out, so they flagged down a police officer who happened to be in the area and told him what happened. As the officer was speaking with the Bentons, he received a dispatch that three black males had been seen hopping fences in the neighborhood. He investigated the call but did not find anyone in the area. Appellant wasn't arrested until two years later, when he was found in Arlington, Texas.

Appellant presented an alibi defense through the testimony of his friend Loren Kinney, who testified she and appellant were at her apartment at the time of the shooting.

## I

Appellant contends the court erred when it allowed the prosecution to present evidence he and his shooting companions were members of a gang. Because he was not charged with any gang crimes or allegations, appellant claims the evidence was irrelevant and unduly prejudicial. However, we find no abuse of discretion in the court's decision to admit the evidence.

The primary source of the gang evidence was Willis, Jr. After he described his initial scuffle with appellant, the prosecutor asked him what he made of appellant's statement, "You guys got this one, but I'll be back." Willis, Jr., said he interpreted the statement to mean appellant would be coming back with "[s]ome of his homeboys or something like that." Upon further questioning, he testified appellant, Get Away and Snow belonged to the Watergate Crips. He said that gang was well known in his parents' neighborhood, and although he never joined it, he did go to school and socialize with

some of its members, including appellant. While he did not describe any of the gang's activities or appellant's role in it, he did say appellant changed his nickname from "Pee Wee" to "C Wee" to show greater allegiance to the Crips.

"California courts have long recognized the potential prejudicial effect of gang evidence." (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.) The danger of such evidence is that it may lead the trier of fact to believe the defendant is criminally disposed and thus guilty of the charged offense simply because he is a member of a gang. (See, e.g., *People v. Cardenas* (1982) 31 Cal.3d 897, 905.) "But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation . . . can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

As the prosecutor suggested in closing argument, appellant's gang membership and the fact he returned to the scene with his fellow gang members was relevant to show he harbored the intent to kill. Appellant disputes this, but if he had returned to the scene with his parents or the police, this would have suggested he *lacked* the intent to kill, and defense counsel would have been within his rights to argue as much. The point is, in many instances, the nature of the defendant's companions can be a highly probative circumstance on the issue of his intent. Here, appellant's decision to enlist his fellow gang members in his revenge scheme was highly probative.

Appellant argues that because the court failed to instruct the jury to consider the gang evidence for the limited purpose of determining his motive or intent, the jury would have been inclined to use the evidence as propensity evidence and to convict him solely on the basis of his gang membership. However, the prosecutor elicited very little gang evidence overall, and in closing argument, she properly tied it into the issue of intent. At no time did she suggest appellant was guilty of the charged crimes simply because he was a bad person or because he was a member of the Watergate

Crips. Moreover, unlike the typical gang case, there was no evidence regarding the activities of appellant's gang or any evidence related to appellant's participation in the gang. So, the gang evidence was relatively benign, and we are unconvinced of its prejudicial impact under the facts of this case. For all these reasons, we conclude the trial court did not abuse its discretion in admitting the challenged evidence.

## II

Appellant also claims there is insufficient evidence to support the court's decision to give the standard instruction on flight. (CALCRIM No. 372.) We find the instruction was properly given.

Per CALCRIM No. 372, the court instructed the jury that "[i]f the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

A flight instruction is proper when the defendant departs the scene of a crime under circumstances that show he was motivated by consciousness of guilt. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) There must be evidence presented at trial which shows the defendant fled or attempted to flee to avoid being observed or apprehended. (*People v. Crandell* (1988) 46 Cal.3d 833, 869.) However, "[t]o obtain the instruction, the prosecution need not prove the defendant in fact fled . . . only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence." (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.)

Here, there was ample evidence from which the jury *could* find appellant fled following the shooting. In the wake of the shooting, he immediately left the scene in the get-a-way car with the others, and he was not found until two years later, in Arlington, Texas. That was enough to allow the jury to reasonably find he did in fact depart the scene of the crime for purposes of avoiding apprehension. (See *People v.*

*Pensinger* (1991) 52 Cal.3d 1210 [flight instruction properly given despite defendant's claim his departure from the state in which the murder occurred was attributable to reasons unrelated to the crime].)

Of course, there was nothing in the court's instruction that *required* the jury to consider appellant's flight as evidence of his guilt. The jury was free to consider the flight instruction for purposes of deciding the charged crimes (but not as conclusive evidence of guilt), or it could have chosen not to apply the instruction at all. As the instruction plainly explained, the meaning of appellant's conduct was for the jury to decide. Considering the wording of the instruction and the nature of the evidence, we do not believe the instruction was improper.

### III

Lastly, appellant contends the trial court erred in denying his motion for a new trial. Once again, we disagree.

Following the verdict, appellant moved for a new trial based on newly discovered evidence. (Pen. Code, § 1181, subd. (8).) The evidence primarily consisted of a declaration from his long-time friend Edwardo Dorsey. According to Dorsey's declaration, he is a Watergate Crip and currently serving time in prison. He also is the junior Bentons' cousin. Although he did not see the initial fight between appellant, Voodoo and the Benton boys, he was standing across the street from the Benton home when the white car returned to the scene. From that position, he could tell Snow was driving the car with Voodoo in the back, but he could not tell if anyone else was in the vehicle. When the car approached the Benton house, Voodoo leaned out his window and fired 3-4 shots from a handgun. Dorsey did not see anyone else with a gun. He talked to Voodoo the night of the shooting and once more after that, and on both occasions, Voodoo expressed remorse for what he had done. Dorsey did not contact the police about the shooting because it is "not in [his] nature" to speak with police officers.

Appellant's attorney also submitted a declaration. He stated Voodoo killed himself with a revolver on October 25, 2005 (three years after the shooting), and testing revealed the revolver was the same weapon that was used in the shooting. He offered this evidence to corroborate Dorsey's claim that Voodoo, and not appellant, was the person who shot at the Bentons.

In assessing this evidence, the court noted Dorsey "only came forward after the conviction in this case. . . . [¶] He made the observations from across the street about who was in the right rear seat, but couldn't say who was in the right front seat and left rear seat. It appears that Mr. Dorsey was from the neighborhood, knew everybody, was related to the victims, but never told anybody about this." Consequently, the court found Dorsey's declaration was "highly suspect" and would not have affected the verdict. Therefore, it denied appellant's motion for a new trial.

A defendant seeking a new trial based on newly discovered evidence must show, inter alia, that the evidence is such as to render a different result probable on a retrial of the matter. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) The trial court has broad discretion in making this determination, and on review, there is a "strong presumption" the court exercised its discretion properly. (*People v. Davis* (1995) 10 Cal.4th 463, 524.) "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." [Citation.] (*Ibid.*)

No such abuse appears here. Appellant suggests it was improper for the court to assess Dorsey's credibility in evaluating his declaration, but "the trial court may consider the credibility as well as materiality of the evidence in its determination [of] whether introduction of the evidence in a new trial would render a different result reasonably probable." [Citation.] (*People v. Delgado, supra*, 5 Cal.4th at p. 329; accord *People v. Turner* (1994) 8 Cal.4th 137, 212; *People v. Minnick* (1989) 214 Cal.App.3d

1478, 1481-1482.) If the court finds the evidence unworthy of belief, it may reject it. (*People v. Sawyer* (1967) 256 Cal.App.2d 66, 80.)

In this case, the court acted well within its discretion in denying the new trial motion. By Dorsey's own admission, he is an incarcerated member of the Watergate Crips and a long-time friend of appellant. He also claimed to be the Benton boys' cousin, but given that he apparently never talked to them (or anyone else) about the shooting, it would seem he is more aligned with appellant, a fellow gang member, than his relatives. In his declaration, Dorsey also admitted he was standing across the street from the Bentons' house at the time of the shooting and could not tell if anyone other than Snow and Voodoo was in the car. This is important because even if appellant was not the shooter, he would still be liable under aiding and abetting principles if he was in the vehicle and aided the shooter in any fashion. (See Pen. Code, § 31.) In other words, Dorsey's claim Voodoo was the sole shooter would not necessarily exonerate appellant for attempted murder.

Because Dorsey had a strong bias toward appellant and his statement did not contradict the prosecution's evidence placing appellant in the white car at the time of the shooting, the trial court did not err in viewing his declaration with distrust and finding it was immaterial to the question of appellant's guilt. There was no abuse of discretion in the trial court's decision to deny appellant's motion for a new trial.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.